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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMER FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal From The Supreme Court Of California

**BRIEF FOR APPELLEES TOWARD UTILITY RATE
NORMALIZATION, CONSUMERS UNION, CONSUMER
FEDERATION OF CALIFORNIA, COMMON CAUSE OF
CALIFORNIA, and CALIFORNIA PUBLIC INTEREST
RESEARCH GROUP**

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STATEMENT OF THE CASE

The Appellees filing this brief adopt the statement of the case set forth in the brief on the merits concurrently being filed by Appellee California Public Utilities Commission (hereafter "CPUC").

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of an effort by the California Public Utilities Commission equitably to apportion the "extra space" in a utility billing envelope between the utility and its customers.¹ The decision below permits Appellee Toward Utility Rate Normalization (TURN)—which the CPUC found "represent[s] the interests of a substantial segment of the PG&E residential ratepayer population" (CPUC App. 19)—to use the extra space in the Pacific Gas & Electric Co. (PG&E) billing envelopes four times a year for the next two years. During these months, PG&E may use any extra space not used by TURN (*id.* at 22) and it also may include additional materials in the envelope if it pays the extra postage. Every TURN insert "shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or [the] Commission." *Id.* at 39. Funds received by TURN as a result of its billing inserts may be used only for "purposes related to ratepayer representation in Commission proceedings involving PG&E." *Id.*

As PG&E has apparently conceded, the CPUC's order will not adversely affect its right to communicate with its customers. Nothing in the order prevents PG&E from sending its monthly newsletter, *Progress* (or anything else), to its ratepayers along with their bills, precisely as has been done in the past. Moreover, although it is theoretically possible that during a particular month including both a TURN insert and *Progress* in the envelope might

¹ The CPUC has defined the "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Appendix to the CPUC's Motion to Dismiss (hereafter "CPUC App.") at 3.

force PG&E to pay some additional postage, PG&E did not demonstrate below that this will ever occur. Indeed, PG&E has specifically disavowed any claim that it might have to pay additional postage as a result of the CPUC's order. In all events, because *Progress* now gets a "free ride" in the utility billing envelope—which is paid for by the ratepayers—requiring PG&E on occasion to pay for mailing its newsletter only places it in the same position as any other user of the postal system, which similarly must pay its own mailing expenses.

Nor does putting TURN's leaflets in the same billing envelope as *Progress* unconstitutionally "dilute" or "chill" PG&E's speech. Speech is not "diluted" or "chilled" merely because it may become the focal point for other, equally-protected expression. The First Amendment does not authorize PG&E to silence TURN in order to strengthen its own speech.

PG&E argues that the decision below violates the "well-established" rule that "a state cannot compel a person to carry a message against his or her will." PG&E Br. 9. Yet numerous decisions of this Court and statutes of unquestioned validity confirm that no inviolable principle of law prohibits government from requiring individuals—and, *a fortiori*, regulated monopolies such as PG&E—to serve as conduits for either government-prepared or third-party messages. Indeed, the same absolutist theory advanced by PG&E here was rejected by the Court in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

PG&E's "well-established" rule is based on its contention that the "negative" rights protected by the First Amendment (*i.e.*, the rights not to speak and not to associate with the speech of others) enjoy the same protection against infringement as do their "affirmative" counterparts. This contention ignores the different goals served by the two classes of rights. While the "affirmative" First Amendment rights to speak and associate freely exist in large part to protect the "marketplace of ideas," "negative" First Amendment rights do not serve this purpose, but instead further two separate and distinct interests: editorial autonomy and "individual freedom of mind." Neither of these interests is adversely affected by the decision below.

The first of these interests—editorial autonomy—was identified by the Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), upon which PG&E heavily relies. But the constitutional flaws which led the Court to invalidate the right-of-reply statute in that case are not found in the decision below. The CPUC's order does not compel PG&E to subsidize the speech of others, nor does it impair PG&E's own ability to communicate. Moreover, TURN's right of access is not triggered by the fact or content of PG&E's own communications; it would remain even if PG&E stopped sending *Progress* in the billing envelope altogether. Finally, the CPUC's order does not interfere with PG&E's editorial judgment, since TURN has not been permitted to invade the pages of PG&E's newsletter.

Moreover, the constitutional principles which apply to a billing envelope and those applicable to a newspaper are quite dissimilar. Unlike newspapers, utility billing envelopes exist primarily to facilitate a commercial transaction; as a result, they historically have been both heavily regulated and used by the States for the transmission of state-mandated messages. Furthermore, billing envelopes are simply passive vehicles for the messages inside them, and have no identity of their own as a medium of communication. For these reasons, a decision as to what should go into a billing envelope is not analogous to the editorial judgment protected by *Tornillo*.

PG&E's reliance on *Tornillo* also fails to recognize that the extra space to which TURN seeks access has been conclusively defined to be ratepayer property under California law. Since the editorial autonomy which *Tornillo* protects does not give an editor control over someone else's property, that decision provides no support for PG&E's efforts to exclude all other parties from the billing envelope extra space.

PG&E's reliance on *Wooley v. Maynard*, 430 U.S. 705 (1977), is no more apt than its invocation of *Tornillo*. *Wooley*, like *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), acknowledges an individual's "right to refrain from speaking" where government attempts to coerce speech in order to advance political or ideological orthodoxy. But PG&E's assumption that *it* may invoke this right is unwarranted. Like the

privilege against self-incrimination, "the right to remain silent" exists to protect an individual's freedom of conscience and hence cannot be claimed by corporations such as PG&E. PG&E's claim of corporate autonomy is also undermined by its voluntary participation in an industry which historically has been pervasively regulated, particularly with respect to the very aspect of its business that is the subject of the regulation at issue here.

In all events, this case involves no violation of the "right to refrain from speaking." The nexus in this case between TURN's speech and PG&E is distant, at best. The billing envelope is not property used by an individual on a daily basis as part of his personal life, but is, instead, simply a medium for an impersonal commercial transaction. Moreover, there is no danger here that TURN's views will be misidentified as belonging to PG&E, because the order explicitly requires TURN's materials to identify their source. Nor is PG&E being required to adopt any particular ideological or political point of view. Finally, because the extra space belongs to the ratepayers, not to PG&E, the utility has no right to prevent the State from enforcing third-party access to that property.

PG&E also contends that any impairment of its "negative" First Amendment rights must be justified by a "compelling state interest." But this Court's cases do not adopt any such rigid approach; instead, the Court has resolved "negative" First Amendment claims by adopting a balancing test in which the level of scrutiny applied to the asserted governmental interest varies in proportion to the degree of intrusion into the individual's autonomy. In this case, the minimal infringement, if any, on PG&E's "negative" First Amendment rights is more than outweighed by the important countervailing interests in encouraging ratepayer participation in CPUC proceedings and expanding the range of information available to ratepayers on energy-related issues.

Finally, PG&E asserts that the CPUC's order is based on an impermissible evaluation of the content of its speech and that the future implementation of the decision will necessarily engender other content-based determinations. The decision below, however, did not rest on a subjective evaluation of either PG&E's

speech or that of TURN. Instead, it was premised on a content-neutral and constitutionally-permissible preference for having two speakers communicating through the billing envelope, rather than one. Given the CPUC's unequivocal intent not to evaluate the content of anyone's speech, the Commission in the future undoubtedly will be able to regulate billing envelope access in a constitutional manner, by either invoking content-neutral criteria for deciding between applicants, adopting a "checkoff" mechanism that would permit all qualified groups to obtain billing envelope access or forming a new, democratically-elected organization to represent ratepayers.

ARGUMENT

I

THE DECISION BELOW DOES NOT INFRINGE PG&E'S RIGHT TO COMMUNICATE WITH ITS CUSTOMERS THROUGH THE BILLING ENVELOPE.

In its Jurisdictional Statement, PG&E contended—as an independent and sufficient ground for reversal—that the CPUC's order would have the effect of "either denying or severely restricting [its] right to disseminate its own information to its customers." J.S. 13. PG&E has now apparently abandoned this argument. Its brief on the merits focuses primarily on the alleged threat posed by the CPUC's order to Appellant's right *not* to speak or to associate with TURN's speech. But because Appellant's brief continues to make unsupportable claims concerning the effect of the decision below on its ability to express its views, we shall address this issue briefly.

A. The Decision Below Does Not Restrict PG&E's Right To Put Its Newsletter In The Billing Envelope.

PG&E and several of its amici claim that the CPUC's order permits TURN "to preempt the billing envelope," by making Appellant's ability to communicate with its customers "hinge entirely upon TURN and its decision as to the length of its message, or the weight of paper that it uses." PG&E Br. 12. This characterization of the decision below has no basis in the facts of this case. Nothing in the CPUC's order bars PG&E from enclos-

ing its newsletter, or anything else,² in customer billing envelopes whenever it chooses to do so. During eight months of the year, PG&E may insert *Progress* in the envelope precisely as it has previously done; in those months, the entire cost of the mailing will continue to be borne by the ratepayers.³ In the remaining four months, Appellant will be similarly free to send *Progress* to its customers, along with TURN's insert, provided only that it pays the additional postage, if any, which the inclusion of *Progress* might require. The length of TURN's message and the weight of its paper thus have no bearing on PG&E's ability to communicate, which is not abridged by the decision below.⁴

It is theoretically possible that the CPUC's order might require PG&E's shareholders to pay the postage for *Progress* if, during a "TURN month," the TURN inserts and *Progress* consume more than the available extra space. But this possibility furnishes no basis for invalidating that decision. Although the amount of billing envelope extra space that PG&E may use during the four "TURN months" without paying additional postage may depend on the length of TURN's message and the weight of TURN's

² The CPUC has expressly disclaimed any attempt to control PG&E's use of the extra space, as far as the content of its communications is concerned. CPUC App. 38.

³ The CPUC's present practice is to require Appellant's shareholders to bear the cost of preparing and printing *Progress* (PG&E Br. 4), but to permit the utility to recover all other costs associated with mailing the newsletter (including postage) from the ratepayers. CPUC App. 6-7. PG&E's newsletter thus gets a "free ride" in the billing envelope at the ratepayers' expense.

⁴ One amicus suggests that PG&E's speech might be limited if TURN's materials use up the physical capacity of the envelope. National Fuel Gas Distribution Corp. Br. 10 n.10. Since the extra space, by definition, is limited to printed matter which will not cause the billing envelope to weigh more than an ounce (see note 1, *supra*), this argument necessarily assumes that PG&E's billing envelopes can hold no more than that amount of material. This is most unlikely to be true, and there is certainly no evidence in the record to support this contention. But even if it were true, PG&E could simply solve the problem by using a larger envelope.

paper, Appellant presented no evidence in the proceeding below on these subjects.⁵ Nor did PG&E present evidence concerning the amount of extra space in the average billing envelope or the average weight of *Progress*. Thus, PG&E has failed to show that it "is immediately in danger of sustaining some direct injury" to its right to communicate, and any claim based on the possibility of increased expense to PG&E is premature at best. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Indeed, PG&E has now waived any claim that the CPUC's order is invalid because it might cause Appellant to incur additional expense.⁶

Moreover, any such claim would be meritless. At most, the decision below occasionally may deprive *Progress* of the "free ride" it has previously enjoyed, by virtue of PG&E's unique status as a regulated monopoly, and force PG&E's shareholders to bear the same expense for mailing the newsletter that all other non-monopoly users of the postal service incur in mailing their messages. But there is no constitutional bar against requiring Appellant "to pay postage in a manner identical to other Postal Service patrons . . ." *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 127 (1981). And even if PG&E were not simply losing this "free ride," the fact that its use of the

⁵ The evidence that does exist on this subject indicates that Appellant's ability to use the extra space without incurring additional expense is not in serious jeopardy. After reviewing the flyer sent out as a result of the CPUC's decision in the *UCAN* case (see J.S. App. 90-110), TURN's attorney testified at the hearing before the CPUC that TURN "could develop something that would be very light, much lighter than the *Progress* . . ." Transcript of Proceedings ("Tr.") 304. The same attorney also testified that TURN could abide by a weight limitation of three-tenths of an ounce on its billing inserts. *Id.* at 393.

⁶ PG&E stated in response to TURN's Motion to Dismiss that "[t]his appeal is not . . . about a 'threat of injury to Appellant' because PG&E may have 'to pay additional postage if it wishes to communicate with its customers.'" Appellant's Brief in Opposition to Motions to Dismiss (hereafter "PG&E Br. Opp.") at 1. Nor does PG&E's brief advert to the financial consequences of the decision below. Any claim that the CPUC's order is invalid because it might cause Appellant to incur additional expense has thus been waived.

billing envelope might become more expensive would not render the CPUC's decision constitutionally suspect. *See City Council v. Taxpayers for Vincent*, ___ U.S. ___, 80 L. Ed. 2d 772, 792 n.30 (1984).

It is quite plain that the Commission, in the exercise of its established rate-setting authority, could have required in the first instance that the costs attributable to mailing *Progress* be charged to PG&E's shareholders, rather than its ratepayers, for rate-making purposes. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 (1980) (no reason to assume that commission could not exclude cost of bill inserts from rate base); *id.* at 554-55 (Blackmun and Rehnquist, JJ., dissenting).⁷ Such an order would be far more burdensome to PG&E than the order it complains of. Yet such an order would be no more than a typical example of state economic regulation which must be upheld if supported by a rational basis. *See, e.g., City of New Orleans v. Duke*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).⁸ *A fortiori*, the decision below—which permits

⁷ Indeed, this Court has already rejected a constitutional attack on a utility commission order that forced a utility's shareholders to bear the entire cost of advertising which the commission found was unnecessary to the provision of utility services. *Rochester Gas & Elec. Corp. v. Public Serv. Comm'n*, 51 N.Y.2d 823, 413 N.E.2d 359, 433 N.Y.S.2d 420 (1980), *appeal dismissed for want of a substantial federal question*, 450 U.S. 961 (1981). Congress, too, has required state utility commissions to consider adopting similar policies. *See* 16 U.S.C. § 2623(b)(5). And PG&E admits that the Commission has the authority to make any "reasonable allocation[] of cost for the extra space" because "[s]uch allocations occur routinely in utility ratemaking." PG&E Br. 39.

⁸ It is true that under a hypothetical CPUC order requiring PG&E to pay the cost for mailing *Progress* every month, PG&E's postage expenses would not be affected by the fact of TURN's speech. But because PG&E constitutionally may be ordered to pay the postage costs for *Progress* twelve times a year, it cannot complain if the CPUC has issued an order which might increase PG&E's mailing costs one-third as often, and then only if TURN uses up all the extra space. "[G]overnments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." *Zauderer v. Office of Disciplinary Counsel*, ___ U.S. ___, 53 U.S.L.W.

PG&E to mail *Progress* to the ratepayers as often as it wishes and which has not been shown to result in *any* increased postage—does not violate PG&E's right to communicate.

B. PG&E's Right To Speak Is Not Violated Merely By Requiring Its Communications To Coexist In The Same Envelope With Those Of Third Parties.

The only concrete way in which PG&E contends that its ability to communicate will be infringed by the decision below is the claim—advanced in a footnote—that the utility's own messages may "suffer irreparably" from coexisting in the same envelope with those of third parties. PG&E Br. 14 n.11. Similar arguments are made by several amici.⁹ These arguments are meritless, for several reasons.

In the first place, PG&E's claim that its messages will not be read once ratepayers "come to expect the [billing] envelope to contain third party solicitations and . . . act accordingly" (PG&E Br. 14 n.11) is sheer supposition. It is at least as likely that the end of PG&E's monopolization of the billing envelope will increase the probability that Appellant's bill inserts will be read, rather than discarded, since the extra space will then become a situs for lively public debate, rather than for the predictable communications of a single never-changing speaker. This contention also bespeaks a rather surprising lack of faith in PG&E's

4587, 4594 n.14 (May 28, 1985). PG&E's "right" to charge the ratepayers for the mailing costs of *Progress*, instead of having to pay them itself like all other users of the postal system, is hardly "fundamental." *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114 (1981).

⁹ Bell Atlantic, for example, contends that inclusion of TURN's inserts in the billing envelope "will dilute the impact" of PG&E's messages (Bell Atlantic Br. 7), while the American Gas Association states categorically—as if it were a self-evident proposition—that when "PG&E's message is included with the message of another party, it is a fundamentally different message than when it is sent by itself." AGA Br. 5. And a third amicus (the Wisconsin State Telephone Association (WSTA)) claims that PG&E's communicative rights will be "chilled" because its speech might be attacked by third parties using the very same medium. WSTA Br. 12.

speech, since its unarticulated premise is that PG&E's messages only carry persuasive power when received in splendid isolation from the messages of those having other viewpoints.

Moreover, this Court has rejected the idea that the presence of several voices in the billing envelope will diminish the efficacy of any speaker's individual communications. When, in *Consolidated Edison*, the New York PSC sought to justify its ban on a utility's bill inserts on the theory that the utility's messages would take the place of inserts that the PSC felt were more desirable, the Court held in response that *both* the Con Ed inserts and the inserts favored by the PSC could coexist in the same envelope: "Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a 'cacophony of competing voices.'" *Consolidated Edison*, *supra*, 447 U.S. at 543. As long as each insert in a billing envelope may be considered by a recipient on its merits, there is no unconstitutional "dilution" of speech.¹⁰

The "chilling effect" theory that the First Amendment has been violated because PG&E's billing envelope messages may "be immediately attacked through the same medium" (WSTA Br. 12; *see note 9, supra*) suffers from similar defects. To begin with, its factual premise is faulty. Since utilities control the mechanics of the billing process, it is difficult to imagine a situation in which a third party would be able to obtain advance

¹⁰ Even if it were true that PG&E's bill inserts might be less persuasive if accompanied by those of TURN, Appellant's constitutional rights would still not be violated. "The First Amendment right to associate and to advocate 'provides no guarantee that a speech will persuade or that advocacy will be effective.'" *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-65 (1979); *cf. Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (no right to demonstrate on jail grounds merely because the area is "'particularly appropriate'" for petitioners' demonstration). If PG&E's communications fail to persuade when placed in the same envelope with those of TURN, PG&E's remedy is not to monopolize the billing envelope, but to speak more persuasively.

information regarding a utility's message in sufficient time to prepare an attack and include it in the very same envelope.¹¹

The legal support for this argument is equally non-existent. While this Court has invalidated government prohibitions, sanctions, and regulations that have a "chilling effect" on speech (*see Laird v. Tatum*, 408 U.S. 1, 11-12 (1972) (collecting cases)), it has never done so where the only "chill" upon the speaker is that caused by the speech of others. Indeed, these "dilution" and "chilling effect" arguments stand the First Amendment on its head. The purpose of that provision is to foster "uninhibited, robust, and wide-open" debate (*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), not to forestall it. Speech is not "diluted" or "chilled" merely because it may become the subject of controversy. *Cf. Cohen v. California*, 403 U.S. 15, 21-22 (1971).¹² And PG&E may not attempt to increase the efficacy of

¹¹ The same amicus which contends that PG&E's speech will be "chilled" by permitting TURN to use the billing envelope also (and contradictorily) suggests that TURN's access will unconstitutionally result in *more* PG&E speech, rather than less. WSTA Br. 12-13. This amicus contends that if TURN attacks PG&E, the utility may feel obligated to "respond or to suffer the clear implication that the accusations are true." *Id.* at 13.

This argument assumes that government-generated or facilitated speech that puts pressure on a private party to respond is unconstitutional. But no decision of this Court is cited for this proposition, and it is impossible to square with reality. Government officials routinely say or do things that create pressure for responses from private parties. (Indeed, there are certain situations—such as when the government issues an indictment—when the affected individual *must* respond.) If government officials do not violate a private party's constitutional rights by making unfounded and defamatory accusations (*Paul v. Davis*, 424 U.S. 693 (1976)), there is certainly no constitutional violation merely because a State has facilitated third-party speech that a utility might find unfavorable and to which it might wish to reply.

¹² The situation is different where either the fact or the content of speech triggers a right of reply. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974). In this case, however, TURN's access to the billing envelope is not dependent on whether PG&E uses the billing envelope or what it says therein. *See p. 22, infra*. Thus, the

its own speech by silencing that of TURN, for such a result is "wholly foreign" to the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).¹³

For all these reasons, the impact, if any, that the CPUC's order may have on PG&E's own communications provides no basis on which to overturn the decision below. PG&E's claimed right to exclude others from the billing envelope must therefore be based not on any inhibition of its affirmative right to express itself, but on the theory that such access allegedly violates its "negative" rights *not* to speak or to associate with the speech of others. See Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 995-96 (1982) (distinguishing between "affirmative" and "negative" First Amendment rights). That is the main argument presented by PG&E's brief, and we shall address it in the section that follows.

only risk that PG&E accepts by communicating through the billing envelope is the chance—inherent in all speech—that its messages may be shown to be unpersuasive by the speech of others. That sort of "chill" is plainly not what the First Amendment was designed to prevent.

¹³ The WSTA brief states that the Chairman of the Wisconsin Public Service Commission has written to utilities in that State, suggesting that they refrain from putting "reply enclosures" in the billing envelope, while simultaneously acknowledging the utilities' right to express their opinions freely. WSTA Br. App. 21a. Of course, the constitutional issues raised by this action are not before the Court. This case concerns a California access program under which the CPUC has explicitly disavowed any intent to regulate the content of either TURN's inserts or those of PG&E. CPUC App. 22, 38.

II

THE DECISION BELOW DOES NOT VIOLATE PG&E'S RIGHTS NOT TO SPEAK AND NOT TO ASSOCIATE WITH THE SPEECH OF OTHERS.

A. The Rights Not To Speak And Not To Associate With The Speech Of Others Are Neither Absolute Nor Identical To Their Affirmative Counterparts.

PG&E claims that compelling it "to publish or distribute materials . . . operates in much *the same* way as telling [it] what it can and cannot publish" (PG&E Br. 17 (emphasis added)) and that, as a result, a "compulsion to speak raises *the same* First Amendment issues as does a direct ban on speech." *Id.* at 13 (emphasis added). These contentions are in error. The "negative" First Amendment rights not to speak and not to associate with the speech of others are not coextensive with their affirmative counterparts. They are, instead, distinct and materially more limited rights, the extent and force of which cannot be mechanically measured by comparison to the corresponding affirmative rights.

It has long been held that the existence of a constitutional right does not, in and of itself, compel the recognition of a converse "negative" right. As the Court stated in *Singer v. United States*, 380 U.S. 24 (1965), "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.* at 34-35. Indeed, when the Court, "follow[ing] the approach of *Singer*," interpreted the Sixth Amendment right to counsel to include a right to proceed *pro se*, the Court stressed that "[t]he inference of rights is not, of course, a mechanical exercise" and that each "implied right must arise independently from the design and history of the constitutional text." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975).

It is readily apparent that the design and purpose of the First Amendment do not support equivalence between the "affirmative" rights to speak and associate freely and the "negative" rights *not* to speak and associate. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). This purpose is necessarily

thwarted when speech is suppressed, since, in that event, the "marketplace of ideas" is impaired and citizens are deprived of information they need for "informed and reliable decisionmaking." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

A compulsion to speak, unlike a prohibition of speech, does not stifle the First Amendment interchange and thus does not endanger the "marketplace of ideas."¹⁴ Indeed, in some circumstances, the First Amendment interchange may be aided by compelled speech, if the information thereby communicated would not otherwise be proffered and is necessary in order to promote other constitutionally permissible goals.¹⁵ Thus, the First Amendment rights not to speak or associate with the speech of others must exist to serve interests that are unrelated to protection of the "marketplace of ideas."

This Court has identified two such interests. The first, discussed in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), is preservation of the "editorial autonomy" of the press. The second, identified in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), is the individual's interest in personal autonomy regarding matters of thought and belief. Where neither of these

¹⁴ Government-compelled speech may in some instances affect the "marketplace of ideas" by either amplifying the voices of some speakers or compelling speech that would not otherwise be communicated. But no constitutional principle requires that the "marketplace of ideas" be regulated strictly according to *laissez faire* principles. For example, as long as government does not restrict or limit expression, it may subsidize some speech, but not others. *Regan v. Taxation With Representation*, ___ U.S. ___, 76 L.Ed. 2d 129, 138-39 (1983); *Buckley v. Valeo*, 424 U.S. 1, 92-94 (1976). Similarly, government may decide that some speech is so desirable that it must be compelled. See pp. 18-20, *infra*.

¹⁵ Financial disclosure requirements, for example, promote the marketplace of ideas by protecting participants against fraudulent or misleading speech. See *Zauderer v. Office of Disciplinary Counsel*, *supra*. Similarly, campaign disclosure laws protect the political marketplace of ideas by promoting a better-informed citizenry, deterring political corruption, and facilitating enforcement of campaign contribution limits. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

interests is implicated, there can be no violation of "negative" First Amendment rights.¹⁶ See *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

Indeed, *PruneYard* illustrates that the rights to remain silent and not to associate with the speech of others are less extensive than the affirmative rights to speak and associate. There the Court held that the First Amendment does not forbid a State from compelling a shopping center owner to permit his property to be used by individuals engaged in political activity protected by the First Amendment. *PruneYard*, *supra*, 447 U.S. at 85-88. If, conversely, the State had attempted to forbid the owner from using or allowing others to use his property for such purposes, the First Amendment undoubtedly would have been violated. See *Buckley v. Valeo*, *supra*. Similarly, while an attorney's right not to speak is not violated by requiring him to disclose specified information regarding his contingency fee arrangements (*Zauderer v. Office of Disciplinary Counsel*, *supra*), the attorney's rights unquestionably would be infringed if the State attempted to prevent him from disclosing the same information. See *Bates v. State Bar of Arizona*, *supra*. As the Court concluded in *Zauderer*, "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." 53 U.S.L.W. at 4594 n.14.¹⁷

¹⁶ In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court noted that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 783. But where the "stock of information" is not threatened—i.e., where no "affirmative" First Amendment rights are being abridged—the interests served by First Amendment "negative" rights are limited to those mentioned in *Bellotti*: protection of the press and the self-expression of individuals.

¹⁷ The Court has intimated on occasion that there are similarities between certain "affirmative" and "negative" First Amendment rights. See *Abood v. Detroit Bd. of Educ.*, *supra*, 431 U.S. at 234 ("[T]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights"); *Miami Herald Publishing Co. v.*

Moreover, the *Zauderer* decision expressly holds that where affirmative speech is not chilled, and freedom of conscience not endangered, any remaining First Amendment interest in not speaking is *de minimis*. While the Court noted that "in some instances, compulsion to speak may be as violative of the First Amendment as prohibitions on speech" (*id.*, citing *Wooley*, *Tornillo*, and *Barnette*), it held that "the interests at stake in this case are not of the same order" as those advanced in the Court's prior decisions vindicating "negative" First Amendment rights. Freedom of belief was not threatened, since the State was not attempting to prescribe ideological orthodoxy. *Id.* Nor, of course, did the case involve the editorial autonomy of the press. As a result, the Court concluded that "appellant's constitutionally protected interest in not providing any particular factual information . . . is minimal." *Id.* (emphasis added).¹⁸

Tornillo, 418 U.S. 241, 256 (1974) ("[T]he Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter"); *Wooley v. Maynard*, *supra*, 430 U.S. at 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind'").

None of these statements, however, either states or implies that "negative" and "affirmative" First Amendment rights are identical in all respects. The sentence from *Abood* relates only to political contributions; the quoted language from *Tornillo* merely restates the obvious fact that an element of government coercion exists for both state-compelled and state-proscribed speech; and the Court's observation in *Wooley*—far from promulgating a general principle of equivalence between "affirmative" and "negative" First Amendment rights—in fact establishes a limiting principle for the latter, as we shall see in Part II(B)(2), *infra*.

¹⁸ The *Zauderer* Court acknowledged that in some circumstances disclosure requirements would implicate First Amendment rights. "We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." 53 U.S.L.W. at 4594. But where protected speech is "chilled," there has been a violation of the "affirmative" First Amendment right to participate freely in the "marketplace of ideas," and it is therefore unnecessary to rely on any claim that "negative" First Amendment rights have been violated. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974). Conversely, where protected speech has

The First Amendment interests implicated by the decision below are no more substantial than in *Zauderer*.¹⁹ Perhaps that is why these interests are not even identified—let alone analyzed—in PG&E's brief. Instead, PG&E invokes an inviolable principle of constitutional law which in fact does not exist: It contends that the Constitution forbids a State from "compel[ling] a person to carry a message against his or her will." PG&E Br. 9.

This Court has rejected precisely the same argument that PG&E presents here. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), appellant claimed that under *Wooley v. Maynard*, 430 U.S. 705 (1977), "the State may not force an individual to display any message at all." *Id.* at 87. The Court, however, refused to adopt this blunderbuss approach, relying on several "distinguishing factors" which differentiated *PruneYard* from *Wooley*. *Id.* Moreover, and of great relevance for this case, in the Court's two prior cases relating to utility billing envelopes, the Court acknowledged the power of utility commissions to require the inclusion of officially-prescribed materials in the billing envelope, as well as their authority to mandate the inclusion of specified information in utility advertisements. *Consolidated Edison*, *supra*, 447 U.S. at 543 (New York PSC could not prove that presence of Con Ed's inserts "would preclude the inclusion of other inserts that [the utility] might be ordered lawfully to include in the billing envelope"); *Central Hudson*, *supra*, 447 U.S. at 571 (PSC could require utility advertisements to "include information about the relative efficiency and expense of the offered service").

not been "chilled," as in this case, there must be an identifiable impairment of a distinct constitutionally-protected interest in order to support a claim that the "negative" right not to speak has been impaired.

¹⁹ Indeed, they are even weaker. While the attorney in *Zauderer* was compelled to adopt a state-prescribed message as his own and convey it to potential clients, PG&E is merely being required to transmit the messages of a third party, messages that will not be associated with PG&E, and that will in fact carry a statement that PG&E has not endorsed them. CPUC App. 39. See pp. 34-35, *infra*.

PG&E's argument that government may never require a person to convey a message not his own would also, if accepted, cut a wide swath through the United States Code, many provisions of which compel speech by private parties. Numerous statutes and regulations require those engaged in commercial transactions to communicate prescribed messages or to make certain enumerated disclosures.²⁰ Nor are the occasions for such compelled speech limited to financial transactions or to the provision of commercial information necessary to prevent deception.²¹ There are also a host of situations in which private entities are required to serve as

²⁰ See, e.g., 15 U.S.C. §§ 77j, 77aa (listing material required to be included in securities prospectuses); 17 C.F.R. § 229.501(c)(5) (requiring issuers of securities to print specific legends stating that their prospectuses have neither been reviewed nor approved by the SEC); SEC Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b) (requiring disclosure of material facts in connection with the purchase or sale of securities); 15 U.S.C. § 1232 (requiring specific information to be disclosed on stickers placed on new automobile windows); 15 U.S.C. § 2302 (requiring specified warranty information to be provided with consumer products); 15 U.S.C. § 1637 (requiring specified disclosures for open end consumer credit plans); 15 U.S.C. § 1664 (requiring specific cost disclosures in advertisements for credit); and 15 U.S.C. § 1667(a) (requiring specified disclosures in consumer leasing transactions and advertisements).

²¹ See, e.g., 15 U.S.C. § 1333(a)(1) (requiring one of four prescribed health warnings to appear on all cigarette packages); 15 U.S.C. § 1333(a)(2), (3) (requiring similar warnings to appear on cigarette print advertisements and billboards); 15 U.S.C. § 1453 (prescribing the content of labels under the Fair Packaging and Labeling Act); 21 C.F.R. §§ 201.1-201.317 (requirements for labeling and directions for using prescription and over-the-counter drugs); 15 U.S.C. § 2063(c) (prescribing form and content of labels under the Consumer Product Safety Act); 21 C.F.R. §§ 369.1-369.22 (warnings required to be given with specified drugs); 21 C.F.R. §§ 801.1-801.430 (requirements for labeling and directions for using medical devices); 15 U.S.C. § 1261(p)(1) (requiring special warning labels and precautionary measures to be listed on hazardous substances); 21 U.S.C. § 343 (food labeling requirements); and 21 U.S.C. § 362 (cosmetic labeling requirements). Compelled speech may also occur in the political arena. See, e.g., 2 U.S.C. § 434 (contribution and expenditure reporting requirements for House, Senate, and presidential campaign committees); see also *Bellotti, supra*,

conduits for the speech of third parties, as opposed to government-originated messages.

The SEC's proxy rules, for example, require covered corporations to include in their proxy materials certain shareholder proposals and statements in support thereof. SEC Rule 14a-8(b)(1), 17 C.F.R. § 240.14a-8(b)(1).²² Under the Landrum-Griffin Act, national and international labor unions are required to distribute by mail to their members the campaign literature of any candidate for union office who requests such distribution, without regard to whether the candidate is favored by the union hierarchy. 29 U.S.C. § 481(c).²³ Similarly, cable operators are required by the Cable Communications Policy Act of 1984 to make a certain percentage of their channels available for "commercial use by

435 U.S. at 792 n.32 (corporate advertisements in political campaigns may be required to identify source).

²² Such shareholder proposals—which may be vigorously opposed by the corporation being forced to mail them—often concern matters of great public controversy, discussion of which clearly enjoys First Amendment protection. See, e.g., *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403 (1972) (shareholder resolution relating to use of company's product in Vietnam); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978) ("Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues").

²³ Cf. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (employer must permit employees to distribute union newsletter on premises in furtherance of employees' rights to engage in concerted activity "for mutual aid and protection" if distribution will not interfere with production or discipline); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (same rule applies to union organizational literature). Indeed, even nonemployees may in certain circumstances use the employer's property to communicate with employees. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). It has never been suggested that an employer has a First Amendment right to prevent his property from being used for the speech of others, even though, like PG&E, he may perceive that speech as adverse to his interests. Cf. *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (First Amendment has no role to play in resolving conflicts between employer's property rights and employees' or organizers' § 7 rights).

persons unaffiliated with the operator....” 47 U.S.C. § 532(b)(1). The same statute also authorizes local governments to require cable operators to designate additional channels “for public, educational, or governmental use.” 47 U.S.C. § 531(b).²⁴ And the FCC requires cable operators to carry locally-available broadcast signals under the “must carry” rules. 47 C.F.R. §§ 76.51-76.67.

PG&E’s invocation of a supposedly ironclad rule preventing government from compelling either speech itself or “association by speech”²⁵ in all instances is thus unsupported by rudimentary First Amendment analysis, is contrary to numerous decisions of this Court, and would, if accepted, result in the invalidation of a score of federal statutes and regulations. Instead, as we have seen, the protection afforded “negative” First Amendment rights serves two discrete and limited interests—the preservation of editorial autonomy and individual freedom of thought. *See* pp. 14-15,

²⁴ The Congress that passed the Cable Act was quite aware of the constitutional issues posed by its requirement that cable franchisees lease channels to rival commercial operators and its authorization of local entities to require their franchisees to offer further leased access for public, educational, and governmental transmissions. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 31-36, reprinted in 1984 U.S. Code Cong. & Ad. News 4655, 4668-73. After careful consideration of these issues, however, the Committee concluded that the “narrowly designed access requirements” of the Cable Act “secured the First Amendment right of the viewers and listeners to a diversity of information sources,” and thus did not violate the First Amendment. *Id.* at 36, 1984 U.S. Code Cong. & Ad. News at 4673.

²⁵ The right not to associate with the speech of others is no more absolute than the right not to speak. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), the Court held that public employees may be required to pay a “service fee” to a union for services related to negotiation and administration of its collective bargaining agreement, notwithstanding the adverse impact on the employees’ First Amendment interests. *Id.* at 222-23, 232. *See also Ellis v. Railway Clerks*, ____ U.S. ____, 80 L. Ed. 2d 428, 446 (1984) (“[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights”).

supra. Neither of these interests is implicated by the decision below.

B. The Decision Below Does Not Compromise PG&E’s Editorial Judgment Nor Invade Its “Individual Freedom of Mind.”

1. The Decision Below Does Not Violate *Tornillo*.

(a) The CPUC’s Order Does Not Suffer From The Constitutional Defects Of The Statute Invalidated In *Tornillo*.

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a Florida statute that compelled newspapers to print replies by candidates for public office who had previously been criticized. The Court gave three reasons for the statute’s invalidation. First, “the compelled printing of a reply” penalized the affected newspaper, depriving it both “of the cost [of] printing and composing time and materials and [of] space that could be devoted to other material the newspaper may have preferred to print.” *Id.* at 256. Second, this penalty was imposed upon a newspaper in direct response to its editorial content; as a result, “editors might well conclude that the safe course is to avoid controversy,” and “political and electoral coverage would be blunted or reduced.” *Id.* at 257. Third, even if the Florida statute had not imposed a content-based penalty, it nevertheless would be unconstitutional “because of its intrusion into the function of editors.” *Id.* at 258. This editorial function, the Court said, is a “crucial process” in the composition of a newspaper, and must therefore remain free from government interference.²⁶

²⁶ As the Court stated:

“A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press....” (*Id.* (footnote omitted))

The reasons which led the Court in *Tornillo* to invalidate Florida's right-of-reply statute are all absent here. First, while the statute in *Tornillo* required newspapers to subsidize third-party access, no such subsidy is involved in this case. Under the CPUC's order, TURN must reimburse PG&E "for all reasonable costs the company incurs beyond its usual costs of billing that result from the addition of TURN's materials." CPUC App. 39. Thus, unlike the statute in *Tornillo*, the CPUC's order extracts no penalty from the utility at all, since PG&E will not have to expend any of its own funds to finance TURN's speech. Nor does the decision below preclude PG&E from inserting any material of its own in the billing envelope. See Part I(A), *supra*. Thus, there is no danger in this case that TURN's inserts will "tak[e] up space that could be devoted to other material [PG&E] may have preferred to print." *Tornillo, supra*, 418 U.S. at 256.

Second, TURN's access to the billing envelope is not dependent on or triggered by the content of PG&E's speech. Indeed, TURN must determine the months during which it desires access at the start of the two-year experimental period, well in advance of any speech of PG&E's to which it might want to reply. CPUC App. 39-40. There is thus no danger in this case, as there was in *Tornillo*, that third-party access will "'dampen[] the vigor and limit[] the variety of public debate'" (*Tornillo, supra*, 418 U.S. at 257), since TURN's access is neither designed nor intended to be responsive to particular instances of PG&E's speech and would continue to exist even if PG&E stopped putting its newsletter in the billing envelope. See Part III(A)(1), *infra*.

Third, and finally, this case involves no intrusion into PG&E's editorial judgment. Unlike the respondent in *Tornillo*, TURN has been granted no right to invade the pages of PG&E's newsletter, *Progress*. As just noted, PG&E retains full and complete freedom to publish whatever it likes in its newsletter, whenever it chooses to do so. See Part I(A), *supra*. The order in this case therefore does not intrude, as did the statute in *Tornillo*, "into the function of editors." *Id.* at 258.

(b) The Editorial Judgment Protected By *Tornillo* Does Not Apply To Utility Billing Envelopes.

Despite these profound differences between *Tornillo* and this case, PG&E nevertheless contends that it has the same right to control what goes into its billing envelope that the publisher in *Tornillo* had to determine what was printed in its newspaper. But PG&E's analogy between a newspaper and its billing envelope is unpersuasive.

The billing envelope exists primarily for the furtherance of a commercial transaction, *i.e.*, the receipt and payment of the utility's bill. Indeed, the presence of the bill in the envelope is the *sine qua non* of this whole controversy: If the bill did not exist, the "extra space" would not be available for use free of additional postage, and bill inserts would not benefit from "the increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately." CPUC App. 4 n.2.

The Court has previously intimated that *Tornillo* does not apply to commercial speech, since it does not prohibit government from requiring "that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976); see also *Central Hudson Gas & Electric Corp. v. Public Service Commission, supra*, 447 U.S. at 571. Thus, the freedom of editorial judgment which protects newspapers from government interference does not apply to speakers engaged in commercial transactions. And the billing envelope, unlike a newspaper, exists primarily to fulfill a commercial function.

For this reason, state regulation of the billing envelope has traditionally been pervasive, extending to both the economic and the expressive components of the billing process. Of course, the State regulates every aspect of the bill itself, with the State determining the rates charged for service, the format for itemizing the amount of service used, the date by which payment must be made, and the procedures for determining the accuracy of the bill. But the States have also routinely required that billing envelopes

be used to communicate both state-composed messages and communications prepared by utilities under direct state supervision.²⁷ Thus, the CPUC has frequently ordered regulated utilities to use their billing envelopes to provide notice to their customers of matters ranging from the availability of utility services²⁸ to the impact of federal legislation on utility rates and products.²⁹ Indeed, the power of state utility commissions to regulate the billing process for communicative purposes is so well-established that the Court in *Consolidated Edison* referred without dissent to the fact that the New York Public Service Commission could lawfully order the utility to include "other inserts" of the Com-

²⁷ In California, for example, the Legislature has required utilities to notify their customers of all applications for increased rates, and specified that the required notice shall include a statement of the increase "in both dollar and percentage terms, a brief statement of the reasons the increase is required or sought, and the mailing address of the commission to which any customer inquiries relative to the proposed increase . . . may be directed." Cal. Pub. Util. Code § 454(a). See also Cal. Pub. Util. Code § 786(b), (c) (requiring telephone companies to give their subscribers specified notices).

²⁸ See, e.g., *Decision No. 84-04-053* (Apr. 18, 1984) Slip Op. at 21 (availability of lifeline program); *Decision No. 82-03-015*, 38 Cal. P.U.C. 2d 318, 327 (1983) (availability and rates of OCMS, a discount telephone service); *Decision No. 93533*, 6 Cal. P.U.C. 2d 741, 762 (1981) (notice that elderly and handicapped customers may designate third parties to receive notices in their behalf); *Decision No. 92603*, 5 Cal. P.U.C. 2d 305, 316 (1981) (availability of communications devices for the deaf); *Decision No. 90769*, 2 Cal. P.U.C. 2d 302, 303 (1979) (availability of utility home insulation program); *Decision No. 88551*, 83 Cal. P.U.C. 503, 532 (1978) (home insulation assistance loan program); *Decision No. 88272*, 83 Cal. P.U.C. 306, 314-15 (1977) (same).

²⁹ See, e.g., *Decision No. 82-09-061*, 9 Cal. P.U.C. 2d 636, 667 (1982) (effects of Economic Recovery Tax Act); *Decision No. 82-05-042*, 9 Cal. P.U.C. 2d 214, 237 (1982) (same); *Decision No. 90308*, 1 Cal. P.U.C. 2d 328, 343 (1979) (notice of additional federal tax credit benefits available for weatherization).

mission's choosing in the billing envelope. *Consolidated Edison, supra*, 447 U.S. at 543.³⁰

This history—which is discussed in greater detail in the CPUC's brief—demonstrates clearly why a utility billing envelope is not equivalent to a newspaper for First Amendment purposes. While the *Tornillo* rule exists to protect "editorial autonomy" (*Herbert v. Lando*, 441 U.S. 153, 207 (1979) (Marshall, J., dissenting)), no such autonomy has ever been recognized with respect to utility billing envelopes. Far from being outside government control, the billing envelope is both a means of conducting a commercial transaction, all elements of which are regulated by the State, and a medium by which government-prescribed messages are transmitted to the utility's customers. PG&E undoubtedly possesses freedom of editorial judgment, but that freedom extends only to its newsletter, and not to the entire billing envelope.

Indeed, a utility billing envelope is precisely what *Tornillo* says a newspaper is not: "a passive receptacle or conduit . . ." *Tornillo, supra*, 418 U.S. at 258. Unlike a newspaper, it has no identity of its own as a medium of communication; it is instead merely a vehicle for carrying the bill, the reply envelope, official notices of the CPUC, *Progress*, and whatever else may be enclosed. Nor is a billing envelope offered to readers in "the marketplace of ideas" or expected to have the same thematic or stylistic unity that frequently characterizes a newspaper or magazine. Thus, while an unwanted reply in a newspaper may be the print equivalent of "a colonial wing [on] a gothic cathedral" (*ICC v. J-T Transport Co.*, 368 U.S. 81, 115 (1961) (Frankfurter, J., dissenting)), a third-party bill insert in a utility envelope—especially one relating to the CPUC's process for regulating

³⁰ PG&E and several amici argue that the numerous occasions on which the California Legislature and the CPUC have exercised control over the billing envelope and its contents are irrelevant to this case. See PG&E Br. Opp. 9; Edison Electric Institute Br. 13. But PG&E's claim that it, and it alone, has the right to determine what goes into its billing envelopes is undermined just as much by a requirement that it include a CPUC-originated message in the envelope as by an order compelling it to open up the envelope to third parties.

that utility—is simply one piece of paper among many. For these reasons, the editorial judgment which *Tornillo* protects has no counterpart in the stuffing of a billing envelope.

(c) *Tornillo* Does Not Apply To The Property Of Others.

The foregoing reasons provide a more-than-sufficient basis on which to reject PG&E's reliance on *Tornillo*. There is, however, an additional reason why PG&E's *Tornillo* claim must fail. *Tornillo* does not give an editor dominion or control over the property of others, and the CPUC has conclusively determined, as a matter of state law, that the billing envelope extra space belongs not to PG&E, but to the utility's ratepayers.

While PG&E attacks this finding vociferously,³¹ the CPUC's determination is entitled to preclusive effect under California law, and is therefore not subject to review here. In 1981, the CPUC determined in Decision 93887 that the "extra space" has "economic value" which is "paid for . . . by ratepayers" (J.S. App. 67, 72, ¶ 58) and that, as a result, the extra space "is properly considered as ratepayer property." *Id.* This finding was necessary to the CPUC's decision that PG&E's use of the extra space for mailing *Progress* was "improper[]" and in violation of PURPA (*id.* at 72, ¶ 59; 67) and that such use "deprives the

³¹ PG&E attacks the CPUC's determination that the billing envelope extra space is ratepayer property by envisioning a "parade of horrors" under which the CPUC could commandeer its trucks, offices, computers, etc. PG&E Br. 32. It also relies on this Court's discussion of utility property rights in *Board of Pub. Util. Commissioners v. New York Tel. Co.*, 271 U.S. 23 (1926). *Id.* at 32-33.

Both of these arguments suffer from the same defect: a failure to recognize that the billing envelope extra space is a unique form of "property" which cannot meaningfully be analogized to other, more tangible possessions of the utility. As one CPUC Commissioner wrote below in dissent, "[t]he 'extra' space in the PG&E billing [envelope] is really not a 'property' but is something of an accident." CPUC App. 50 (Calvo, dissenting). Thus, for example, if federal postage rates were suddenly to be charged in increments of less than an ounce, the extra space would disappear (or at least be greatly reduced). That is not true for PG&E's trucks, offices or computers.

ratepayers off[] the economic value of the 'extra' space in the billing envelope." *Id.* at 72, ¶ 59. PG&E unsuccessfully sought a rehearing of Decision 93887, attacking these very findings. But it did not seek review of that decision either in the California Supreme Court or in this Court.

Once Decision 93887 became final, the CPUC's findings regarding the extra space became entitled to preclusive effect as a matter of California law.³² For this reason, the CPUC held in the instant case that its prior decision had already determined that the extra space had economic value and belonged to the ratepayers (CPUC App. 33, Findings of Fact, ¶¶ 1, 3, 4) and that these findings "should not be relitigated in this proceeding." *Id.* at 36, Concl. of Law, ¶ 1; see also *id.*, ¶ 2. In seeking a writ of review in the California Supreme Court, PG&E claimed that the CPUC had erred, under California law, in precluding it from relitigating these issues in this case. See Reply Brief in Support of Petition for Writ of Review of Pacific Gas and Electric Company at 34-42. The California Supreme Court denied review, however, and its affirmance of the CPUC's refusal to permit relitigation of an issue of state law settled in a prior, and now final, proceeding plainly rests upon an independent and adequate non-federal ground.³³ Moreover, even if it were not protected by the doctrine of

³² *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630-31, 268 P.2d 723, 728 (1954), appeal dismissed, 348 U.S. 849 (1954); *Consumers Lobby Against Monopolies v. PUC*, 25 Cal. 3d 891, 901, 160 Cal. Rptr. 124, 129, 603 P.2d 41, 46 (1979) ("[O]ur denial of such a petition raises the bar of res judicata against relitigation of the same cause of action between the same parties or their privies"); see also Cal. Pub. Util. Code § 1709 ("In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive").

³³ PG&E has contended that the CPUC's "ratepayer property" determination in Decision 93887 is not final under California law because: (1) the finding was "only incidental" to the CPUC's "ultimate decision" in that proceeding; and (2) under California law, a determination of a question of law, as opposed to one of fact, "is not conclusive either if injustice would result or if the public interest requires that litigation not be foreclosed." PG&E Br. Opp. 1-2 n.1.

collateral estoppel, the CPUC's state-law "ratepayer property" determination is unreviewable in this Court.³⁴

Thus, the *Tornillo* issue must be evaluated in the context of a binding state court determination that the extra space to which TURN seeks access is ratepayer property, which does not belong to PG&E. Resolution of this issue is not difficult. The editorial judgment which *Tornillo* protects applies only to an editor's own

Both of these arguments suffer from the same fatal flaw. The issue of whether the CPUC's findings in Decision 93887 are entitled to preclusive effect in this case has itself been litigated in this proceeding, resulting in a formal CPUC finding that its prior determination "should be considered final for the purpose of this proceeding." CPUC App. 36. This finding was in turn attacked by PG&E in the California Supreme Court, but when that court denied PG&E's Petition for Review, it rendered a final decision as a matter of state law that the CPUC's findings in Decision 93887 were entitled to preclusive effect in this case. See *People v. Western Air Lines*, *supra*, 42 Cal. 2d at 630-31, 269 P.2d at 728 ("[T]he denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. This is so even though the order of this court is without opinion" (citation omitted)). Since that issue has now been conclusively resolved, this Court cannot give the CPUC's determination in Decision 93887 less effect than did the CPUC and the California Supreme Court. 28 U.S.C. § 1738; *Migra v. Warren City School Dist. Bd. of Educ.*, ___ U.S. ___, 79 L. Ed. 2d 56 (1984).

³⁴ "Because property interests are creatures of state law" (*Board of Curators v. Horowitz*, 435 U.S. 78, 82 (1978)), a State may define and circumscribe PG&E's interests in the billing envelope "extra space" as it sees fit, unless the federal Constitution is violated. See *Estate of Thornton v. Caldor, Inc.*, ___ U.S. ___, 53 U.S.L.W. 4853, 4855 n.8 (June 26, 1985) (state court's construction of state law binding on the Court); cf. *Consolidated Edison*, *supra*, 447 U.S. at 556 (Blackmun and Rehnquist, JJ., dissenting). But any such constitutional claim has long since been waived; although PG&E contended below that the CPUC's decision violated the Fifth Amendment, no such claim was presented in its Jurisdictional Statement or argued in its brief on the merits. In any event, the Fifth Amendment claim is insubstantial, for the reasons discussed in the Brief Amicus Curiae of the State and Local Legal Center on behalf of the National League of Cities, et al., Part V.

newspaper; it does not authorize editors to interfere with the uses which others may make of their property.

2. The Decision Below Does Not Violate *Wooley*.

(a) A Regulated Monopoly Does Not Possess The "Individual Freedom Of Mind" Protected By *Barnette* And *Wooley*.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), several school children sued to invalidate West Virginia's compulsory flag salute statute, contending that it violated their "right of self-determination in matters that touch individual opinion and personal attitude." *Id.* at 631. The Court upheld this claim, finding that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." *Id.* at 636; see also *Wooley v. Maynard*, *supra*, 430 U.S. at 714-15.³⁵

The Court's holding in *Barnette* was elaborated upon and extended in *Wooley v. Maynard*, 430 U.S. 705 (1977). The Court there held that the "right to refrain from speaking" and the "right to speak freely" are "complementary components of the broader concept of 'individual freedom of mind.'" *Id.* at 714, quoting *Barnette*, *supra*, 319 U.S. at 637. The first of these rights was implicated in *Wooley* because the state action there at issue—forcing an individual to display a state motto ("Live Free or

³⁵ The penultimate paragraphs of the opinion bear repeating in order to underscore the values which *Barnette* invoked:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." (*Id.* at 642)

Die") on his automobile license plate—impaired the "First Amendment . . . right of individuals . . . to refuse to foster an idea they find morally objectionable." *Wooley, supra*, 430 U.S. at 715. *Wooley* and *Barnette* thus protect "a right of self-determination in matters that touch individual opinion and personal attitude" against government intrusion. *Barnette, supra*, 319 U.S. at 631.³⁶

PG&E would have this Court extend this "concept of 'individual freedom of mind' " to regulated utilities such as itself. It relies on *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), for the proposition that "corporations are . . . entitled to free speech." PG&E Br. 10-11. This argument distorts *Bellotti*'s holding. While the Court held there that corporate speech pertaining to a ballot referendum could not be restricted, the *Bellotti* Court expressly refrained from deciding "whether corporations have the full measure of rights that individuals enjoy under the First Amendment." *Bellotti, supra*, 435 U.S. at 777.³⁷ Indeed, the Court expressly recognized that there are some "purely per-

³⁶ Thus, both of these decisions invoke the principle of "individual freedom of mind" (*Barnette, supra*, 319 U.S. at 637 (emphasis added); *Wooley, supra*, 430 U.S. at 714 (emphasis added)); and both decisions speak of "the sphere of intellect and spirit" which the First Amendment protects. *Barnette, supra*, 319 U.S. at 642; *Wooley, supra*, 430 U.S. at 715. Other decisions of the Court sound the identical theme. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State") (emphasis added); *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality opinion) ("Even a pledge of allegiance to another [political] party, however ostensible, only serves to compromise the individual's true beliefs") (emphasis added).

³⁷ The *Bellotti* Court found that protecting the ability of corporations to participate in ballot measure campaigns enhances the "marketplace of ideas," inasmuch as "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti, supra*, 435 U.S. at 777. But, as shown in text, this primary First Amendment value is *not* furthered by permitting corporations to assert "negative" First Amendment rights.

sonal' " rights that "are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." *Id.* at 778 n.14. "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Id.* Consideration of these factors in the context of "negative" First Amendment rights compels the conclusion that they do not protect corporations such as PG&E.

We have seen above that "negative" First Amendment rights exist, *inter alia*, to protect the individual's interest in freedom of thought and conscience. See pp. 14-15, *supra*. But this interest is one which corporations share in only marginally, if at all, for artificial entities have no "sphere of intellect and spirit" to protect. As Justice White stated in *Bellotti*, without disagreement from the majority, "the use of communication as a means of self-expression, self-realization, and self-fulfillment is not at all furthered by corporate speech." *Bellotti, supra*, 435 U.S. at 804-05 (White, J., dissenting).³⁸ Thus, the rights recognized in *Wooley* and *Barnette* are among the "purely personal" guarantees (*id.* at 778 n.14) which do not cover corporations and other artificial legal entities "organized for economic gain." *FEC v. National Conservative Political Action Committee*, ____ U.S. ____, 84 L.Ed. 2d 455, 472 (1985). And because the Court has never extended these rights to artificial entities such as corporations,³⁹

³⁸ In both *Bellotti* and *Consolidated Edison*, the Court differentiated between the First Amendment values of "[t]he individual's interest in self-expression" and "the concern for open and informed discussion . . ." *Bellotti, supra*, 435 U.S. at 777 n.12 (1978); see also *Consolidated Edison, supra*, 447 U.S. at 534 n.2. Significantly, the Court's holding in both of those cases refrained from invoking the former interest, and instead relied exclusively on the latter. *Bellotti, supra*, 435 U.S. at 776-77 & n.11; *Consolidated Edison, supra*, 447 U.S. at 534 & n.2.

³⁹ *Miami Herald Publishing Co. v. Tornillo, supra*, is not an exception to this statement. Any right not to speak recognized in that case was, as we have seen, limited to the protection of "editorial autonomy," a right which is limited to newspapers, corporate or otherwise. See pp. 22-23, *supra*. Thus, while government may not tell a newspaper what to print in

their "historic function" . . . has been limited to the protection of individuals." *Bellotti, supra*, 435 U.S. at 778 n.14.⁴⁰

Lastly, PG&E's regulated status provides an additional reason why it cannot invoke the rights recognized in *Barnette* and *Wooley*. The Court has recognized in numerous cases that pervasive regulation diminishes a business' claim to privacy. For example, in the context of corporate and other associational records, the Court has acknowledged the plenary authority of the State over such documents as a basis for rejecting the claim that such records are privileged under the Fifth Amendment. See *Bellis v. United States*, 417 U.S. 85, 92 (1974). A similar recognition has occurred in the Fourth Amendment context.⁴¹ Thus, the State's regulatory authority over a particular business or

its pages, it may prescribe what a corporation shall include in its annual filings with the SEC, in its proxy statements, and in the labels on its products. See pp. 18-20, *supra*.

⁴⁰ This conclusion is buttressed by the Court's cases dealing with the privilege against self-incrimination: a right which, like the right not to speak recognized in *Barnette* and *Wooley*, protects the individual against a state command to use his or her expressive powers for the State's ulterior purposes. Just as the right not to speak protects a "sphere of intellect and spirit," the privilege against self-incrimination "respects a private inner sanctum of individual feeling and thought." *Couch v. United States*, 409 U.S. 322, 327 (1973); see also *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Yet the Court has recognized since the beginning of this century that granting the privilege against self-incrimination to corporations would be an "unjustifiable extension . . . of . . . personal rights . . ." *Wilson v. United States*, 221 U.S. 361, 385 (1911); see also *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906); *United States v. White*, 322 U.S. 694, 699-700 (1944).

⁴¹ Thus, the Court has held that those who engage in "pervasively regulated business[es]" (*United States v. Biswell*, 406 U.S. 311, 316 (1972)), "closely regulated" industries "long subject to close supervision and inspection" (*Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74, 77 (1970)), or businesses where the "regulatory presence is . . . comprehensive and defined" (*Donovan v. Dewey*, 452 U.S. 594, 600 (1981)) have more limited rights of privacy than businesses generally. See *Marshall v. Barlow's, Inc.*, *supra*, 436 U.S. at 313; *Donovan v. Dewey*, *supra*, 452 U.S. at 599-602, 606.

subject area may forestall any claim that the business or subject matter constitutes a private preserve into which government may not intrude.

This principle is plainly applicable to this case. The Court has held that the regulated status of a utility does not detract from its "affirmative" free speech rights, because its "position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters." *Consolidated Edison, supra*, 447 U.S. at 534 n.1. But the fact that PG&E is a regulated monopoly, whose rates and services concededly may be supervised by the CPUC (PG&E Br. 3), necessarily limits the scope of its "negative" First Amendment rights, especially where the subject of the state regulation at issue in this case—the billing envelope—has historically been a focal point for the State's regulatory efforts. When a corporation has "voluntarily chosen to subject [itself] to a full arsenal of governmental regulation" (*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)), its sphere of corporate autonomy is accordingly limited.

(b) The Decision Below Does Not Impair PG&E's "Individual Freedom of Mind."

Even if, *arguendo*, utilities such as PG&E might in some instances invoke the "negative" First Amendment rights recognized in *Barnette* and *Wooley*, these rights are not violated by the decision below. There are at least four reasons why the most applicable precedent to this case is *PruneYard Shopping Center v. Robins*, *supra*—in which no violation of those rights was found—instead of the decisions on which PG&E so heavily relies.

First, the nexus in this case between the speaker and the "compelled speech" is far more tenuous than in *Barnette* and *Wooley* and much more analogous to *PruneYard*. In *Barnette*, of course, the State's invasion of the individual's personal autonomy was at its greatest, since the students there were required to signify assent with the State's ideological message by both word and deed. In *Wooley*, the nexus was more distant than in *Barnette*, but it was still pronounced, for there the state-composed message was "required . . . to be displayed openly on Appellee's personal property that was used 'as part of his daily life . . .'"

PruneYard, *supra*, 447 U.S. at 87. In *PruneYard*, by contrast, the nexus was attenuated, since in that case the property at issue was "not limited to the personal use" of appellant. *Id.*

In this case, the nexus between PG&E and TURN's speech is distant, at best. Even if PG&E could claim some limited area of "corporate autonomy" analogous to the "sphere of intellect and spirit" protected by *Barnette* and *Wooley*, such a protected area would undoubtedly be limited only to those aspects of its corporate speech or behavior where the corporation exhibits its "personality," such as its newsletter. But no such "personality" is expressed in the billing envelope, which is simply a passive vehicle used primarily to further an impersonal commercial transaction. Indeed, the notion of the billing envelope *qua* envelope as a medium for the expression of PG&E's "personality" is undermined by the envelope's historic subjection to extensive state regulation, including its use for the transmission of state-composed messages. Thus, like the shopping center in *PruneYard*, the billing envelope has never been exclusively used by Appellant.

Second, again as in *PruneYard*, there is no danger here that TURN's speech "will . . . likely be identified" as that of PG&E. *PruneYard*, *supra*, 447 U.S. at 87. Because the billing envelope has traditionally been used to carry both PG&E-composed and state-mandated messages, ratepayers who receive a TURN message in the billing envelope will not necessarily associate it with PG&E, any more than a pedestrian in a shopping center would necessarily assume that a soapbox orator's message reflected that of the management. Moreover, the CPUC has taken pains to ensure that no such confusion will occur, by requiring that each TURN insert "clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission." CPUC App. 39. Indeed, this point is conceded by one of PG&E's amici, which candidly acknowledges that the CPUC-required disclaimer "removes the false inference that recipients of the billing envelope might otherwise draw that PG&E is the source of TURN's messages or necessarily agrees

with them." Bell Atlantic Br. 7.⁴² Finally, the probability that anyone would mistake TURN's speech for PG&E's is further minimized by the fact that TURN presumably will use its billing envelope access to express positions which are different from and inconsistent with those of the utility. And if, in spite of all this, PG&E still believes that the ratepayers will nevertheless persist in confusing its speech with that of TURN, it may, like the shopping center owner in *PruneYard*, "expressly disavow any connection with the message" or put its own, responsive insert in the envelope. *PruneYard*, *supra*, 447 U.S. at 87.

Third, in this case, unlike *Barnette* and *Wooley*, the State has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, *supra*, 319 U.S. at 642. Instead, as in *PruneYard*, "no specific message is dictated by the State," and there is thus "no danger of governmental discrimination for or against a particular message." *PruneYard*, *supra*, 447 U.S. at 87. The decision below is thus not part of an effort which is itself at odds with the diversity fostered by the First Amendment. Moreover, since PG&E is "not . . . being compelled to affirm [its] belief in any governmentally-prescribed position or view" (*id.* at 88), but only to provide access to others on a non-discriminatory basis (*see* Part III, *infra*), this case does not involve an impairment of individual conscience of the kind that so troubled the Court in *Barnette* and *Wooley*. Thus,

⁴² PG&E's own submission on this point, however, requires correction. PG&E writes:

"It is highly likely that the public will receive a mistaken impression that the State's selection of TURN to send its message in the billing envelope is supported by PG&E. Even a disclaimer, as proposed by the commission, would not remove this impression. Rather, a disclaimer would force PG&E to speak even though it prefers to remain silent." (PG&E Br. 19 (citation omitted))

This verbal sleight-of-hand attempts to conceal one crucial fact: The CPUC did not "propose" that PG&E issue a disclaimer; instead, it *required* TURN to provide one. How PG&E can contend, in light of this requirement, that "it is highly likely" that the public will misidentify TURN's messages is nowhere explained in its brief.

for all of PG&E's reliance on the "right not to speak," it is not in actuality being forced to say anything, unlike the plaintiffs in those cases, who were forced to engage in speech or conduct that, in effect, required them to adopt a state-prescribed viewpoint as their own.

Fourth, and finally, it is conclusively established for purposes of this appeal that the extra space in the billing envelope to which access has been granted is not PG&E's property. See pp. 26-28, *supra*. In *Wooley*, the message that was objected to had to be displayed on the plaintiff's own automobile, while in *PruneYard* (where, nevertheless, no constitutional violation was found), access was granted to the shopping center owner's private property. That is not the case here. Thus, this case provides even less basis than *PruneYard* for a successful claim that the First Amendment right not to speak has been violated.

C. Any Alleged Infringement Of PG&E's Rights Not To Speak And Not To Associate With The Speech Of Others Is Justified By The Important Governmental Interests That The CPUC's Order Serves.

1. The CPUC's Order Need Not Be The "Least Restrictive Means" Of Advancing A "Compelling" State Interest.

Because PG&E fails to recognize the distinction between "affirmative" and "negative" First Amendment rights, it asserts that the CPUC's order must be subjected to the exacting scrutiny traditionally reserved for restrictions on speech that are not content- or viewpoint-neutral. PG&E's mechanical invocation of the "compelling state interest" standard, however, is fundamentally at odds with this Court's approach in cases involving "negative" First Amendment rights. Instead of ritualistically applying formulas derived from the affirmative First Amendment context, the Court has evolved a "sliding scale approach to balancing," in which "the extent to which compelled expression must serve the public interest . . . depends on the extent to which the individual interests are infringed." *Gaebler, supra*, 23 B.C.L. Rev. at 1016. "The more serious the infringement of individual interest, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa." *Id.*

A review of this Court's decisions involving "negative" First Amendment claims illustrates the balancing approach actually

employed by the Court in resolving such challenges. In each case, the degree of scrutiny applied to the asserted governmental interests varied in accordance with the degree of the intrusion into the individual's protected interest in personal autonomy regarding matters of thought and conscience. Thus, for example, in *Barnette*—a case in which the required affirmation of belief was so repugnant to the concept of "individual freedom of mind" that extended analysis of the competing governmental interest in promoting national unity was unwarranted—the Court declared that such "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." 319 U.S. at 633. In *Wooley*—a case that the Court characterized as involving a less serious infringement upon personal liberties than *Barnette* (see *Wooley, supra*, 430 U.S. at 715)—the State's countervailing interests received greater attention from the Court and were evaluated under the less demanding standard of *United States v. O'Brien*, 391 U.S. 367 (1968). See 430 U.S. at 715-17. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—where the First Amendment impact of compelling employees to support the collective-bargaining and contract-administration activities of the union was weaker still—the Court simply deferred to the legislative judgment, acknowledged in prior cases, that the infringement on First Amendment rights was justified by "the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222.⁴³ In *Zauderer*—in which an attorney's constitutionally protected inter-

⁴³ *Abood* vividly illustrates the shifting balance by which the Court evaluates claims that "negative" First Amendment rights have been abridged. For while the Court upheld compelling public employees to pay a service fee for collective bargaining expenses without invoking strict scrutiny, the Court also ruled in the very same case that compulsory subsidization of ideological activities unrelated to collective bargaining was constitutionally impermissible "regardless of any asserted governmental justification." *Id.* at 254 (Powell, J., concurring). The majority obviously perceived a greater infringement of the public employees' First Amendment rights in being compelled to finance political and ideological causes than in being required to contribute to the collective-bargaining activities of the union and therefore applied a markedly less restrictive test to the latter subsidy.

est in not providing particular factual information was found to be "minimal" (53 U.S.L.W. at 4594)—the Court applied an even more lenient standard, concluding that an advertiser's First Amendment rights are adequately protected as long as the disclosure requirements are "reasonably related to the State's interest in preventing deception of consumers." *Id.* And in *PruneYard*—where the Court could discern little, if any, impairment of the shopping center owner's First Amendment rights—the Court upheld the State's forced access requirement without engaging in any balancing at all.

The Court, therefore, has not consistently used the "compelling state interest" test in adjudicating claims based on "negative" First Amendment rights. Nor has it required the State to demonstrate in every case that its chosen alternative is the "least restrictive means" of advancing its interests. See *Zauderer, supra*, 53 U.S.L.W. at 4594 n.14. Similarly, the Court has recently emphasized that "least restrictive means" analysis is not even a component of the *O'Brien* test referred to in *Wooley*. See *United States v. Albertini*, ____ U.S. ____, 53 U.S.L.W. 4844, 4848 (June 24, 1985).

Under the Court's balancing approach, the "question in each case must be whether the compelled participation in expression infringes unduly upon individual interests." *Gaebler, supra*, 23 B.C.L. Rev. at 1016. In this case, the minimal infringement, if any, on PG&E's "negative" First Amendment rights requires only the most cursory examination of the countervailing governmental interests. But even under a more demanding level of review, the decision below withstands constitutional scrutiny, for any impact on PG&E's rights is more than outweighed by the several important governmental objectives directly advanced by the CPUC's order.

2. The CPUC's Order Is Narrowly Drawn To Further Important Governmental Interests.

The interests served by the CPUC's order are plainly constitutionally sufficient. As the Commission's decision explained, a number of significant governmental interests are directly advanced by opening the extra space to a multiplicity of voices, including promoting ratepayer representation in CPUC proceedings and expanding the information made available to utility

customers on energy-related issues. CPUC App. 27. These interests in turn implement significant constitutional values in no less than four different ways.

First, as the CPUC noted, permitting entities other than PG&E to obtain access to the billing envelope will expose the ratepayers "to a variety of views" and thus assure "more complete ratepayer understanding... [of] energy issues involving their utility." CPUC App. 22, 29. Promoting an informed citizenry is plainly a constitutional interest of the highest order. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (State "may seek to disseminate information so as to enable its citizens to make better informed decisions"); *Buckley v. Valeo, supra*, 424 U.S. at 92-93 & n.127 (upholding public financing of election campaigns as a legitimate effort to "use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people"). State action which enables the ratepayers to receive information through the billing envelope from a variety of sources thus promotes a core First Amendment value.

Second, citizens who receive TURN's messages through the billing envelope may thereupon decide to exercise their associational rights under the First Amendment, by joining the organization and contributing to its efforts.⁴⁴ "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."

⁴⁴ The amicus brief filed by the New York Citizens' Utility Board, Inc. and the Utility Consumers' Action Network reveals that the latter organization, which has obtained billing envelope access for the last two years, has attracted approximately 70,000 contributors within the service area of San Diego Gas & Electric. UCAN Br. 2. Because PG&E's service area is larger than that of San Diego Gas & Electric, TURN's access to the billing envelope may attract an even greater number of contributors and members, most of whom undoubtedly could not have been reached by TURN absent billing envelope access. Thus, the CPUC's grant of such access to TURN promotes the important constitutional right of free association on a massive scale, providing many thousands of persons with the opportunity to join an organization about which they might otherwise remain uninformed.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981). And government may promote the exercise of associational rights for the same reasons that it may "provid[e] financial assistance to the exercise of free speech . . ." *Buckley v. Valeo*, *supra*, 424 U.S. at 93 n.127. See, e.g., *Regan v. Taxation With Representation*, *supra*.

Third, those individuals who exercise their associational freedom and decide to join TURN will assist that organization in promoting the First Amendment rights of itself and its members to participate in administrative and judicial proceedings. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment" (*United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971)), and this is no less true for similar activity designed to promote responsible participation in administrative proceedings before the CPUC. Indeed, such participation, by a non-profit organization that seeks to advance its members' collective interests, is particularly favored by the First Amendment. Compare *In re Primus*, 436 U.S. 412, 427-30 (1978) with *Ohrlik v. Ohio State Bar Association*, 436 U.S. 447, 458-60 (1978).

Fourth, as the CPUC noted, TURN's increased ability to participate in CPUC proceedings resulting from its billing envelope access will promote better-informed Commission decisions. The intervention of ratepayer representative organizations in utility ratemaking cases assists the fact-finding process, by enhancing its accuracy, because such intervenors often possess special expertise regarding the complex and technical issues typically involved in such proceedings. As the Commission specifically found in its decision below: "Participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff." CPUC App. 36.⁴⁵

⁴⁵ Indeed, the significance of this interest has been recognized not only by the CPUC in this case, but also by Congress, the California Legislature, and the courts. In *Consumers Lobby Against Monopolies v. Public Util. Comm'n*, 25 Cal. 3d 891, 911, 160 Cal. Rptr. 124, 136, 603 P.2d 41, 53 (1979), the California Supreme Court noted that public

Appellant's entire challenge to the sufficiency of these interests consists of its bald assertion that the stated justifications "are neither compelling nor substantial" (PG&E Br. 35),⁴⁶ and its suggestion that a variety of other alternatives might achieve the government's objectives equally well without infringing at all upon the utility's First Amendment rights. *Id.* at 37-40.⁴⁷ As demonstrated in the preceding paragraphs, however, the substantiality of the interests served by the CPUC's order has consistently been acknowledged by this and other courts, and PG&E's mere *ipse dixit* to the contrary is unavailing. Furthermore, the Commission's order may not be invalidated "simply because there is some imaginable alternative that might be less burdensome on speech. . . . The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government

interest intervenors "fill a gap in the ratemaking process" because the Commission staff "cannot fully and adequately represent all facets of the public interest . . ." Similarly, one of Congress' primary goals in enacting the Public Utility Regulatory Policy Act (PURPA) was to encourage intervention by consumers in ratemaking procedures. See 16 U.S.C. § 2631(a) (granting "any electric consumer of an affected electric utility" the right to "intervene and participate as a matter of right in any ratemaking proceeding"); § 2632 (attorneys' fees); § 2633 (judicial review). See also Cal. Pub. Util. Code § 454(c) (requiring the CPUC to permit individual residential public utility customers to testify at any rate increase hearing).

⁴⁶ PG&E also contends that *Buckley v. Valeo*, *supra*, "rejected almost all of these alleged governmental interests as insufficient to regulate First Amendment rights." PG&E Br. 35. But PG&E ignores the critical distinctions between this case and *Buckley*: here, no speech of Appellant's has been suppressed, nor (as was true in *Buckley*) have any restrictions been imposed on the amount Appellant may expend to disseminate its own views. See Part I, *supra*.

⁴⁷ For example, PG&E contends that the interest in promoting participation in CPUC proceedings could be equally well-served by awarding attorneys' and expert witness' fees, ignoring TURN's demonstration below that because such fees are only awarded after-the-fact (and often after lengthy delays), they do not enable financially pressed ratepayer groups to hire the experts and attorneys they need. See Exh. 1 at 6.

interests.” *United States v. Albertini*, *supra*, 53 U.S.L.W. at 4848 (citations omitted); *accord*, *Zauderer v. Office of Disciplinary Counsel*, *supra*, 53 U.S.L.W. at 4594 n.14. It is enough that the CPUC’s order effectively advances several substantial governmental interests. Thus, even if there were some impact on PG&E’s First Amendment rights, the CPUC’s order is constitutionally permissible.⁴⁸

III

THE CPUC HAS NOT ENGAGED IN VIEWPOINT-BASED DISCRIMINATION, HAS NOT IMPERMISSIBLY CONSIDERED THE CONTENT OF ANYONE’S SPEECH, AND DOES NOT PROPOSE TO DO SO.

PG&E contends that the CPUC has improperly “[e]valuated the [c]ontent of [s]peech.” PG&E Br. 22. It actually complains of three distinct matters: *First*, it says that the CPUC made a judgment about the content of PG&E’s speech in deciding to open access to the extra space in the billing envelope. *See id.* at 22-24. *Second*, it asserts that the CPUC also evaluated the content of TURN’s proposed speech and made a judgment that TURN’s message was superior to that of PG&E. *See id.* at 23-24. *Third*, it contends that in the future the CPUC inevitably will have to make comparative evaluations of the speech of rival applicants for access to the extra space. *See id.* at 25-27. All of this is condemned as constituting “improper content censorship.”

⁴⁸ In addition to the interests previously discussed, the Commission’s order also serves the substantial interest, identified in *Consolidated Edison*, of remedying forced subsidization of the utility’s speech. *See* 447 U.S. at 543; *id.* at 544 (Marshall, J., concurring); *id.* at 551-54 (Blackmun and Rehnquist, JJ., dissenting). While PG&E asserts that this problem may be remedied by a simple allocation of costs between its ratepayers and its shareholders (PG&E Br. 39), the CPUC concluded in the proceeding below that it was impossible to assign a fixed economic value to the extra space. CPUC App. 33. For this reason, an allocation of costs is not feasible. Thus, the CPUC instead adopted an innovative remedy which, by permitting a ratepayer-supported organization to share in the extra space, both directly addresses the problem of PG&E’s monopolization of that resource and simultaneously furthers the significant state interests in encouraging ratepayer representation and expanding the availability of information.

Id. at 25. As will be shown, however, these charges are both factually and legally wrong.

A. In Ordering PG&E To Give TURN Access To Its Billing Envelope Four Months Per Year, The CPUC Did Not Consider The Content of PG&E’s Speech Or Prefer The Viewpoint Of TURN.

The CPUC’s decision to require PG&E to allow others access to the extra space involved no subjective evaluation of the content of PG&E’s speech—let alone an official condemnation of the viewpoints expressed by the utility. Rather, its decision followed a determination in Decision 93887 that the extra space is ratepayer property which PG&E was using for its own purposes—*i.e.*, other than for delivery of bills and legally mandated notices.⁴⁹ CPUC App. 3-4. But Decision 93887 contained no evaluation of the wisdom or desirability of Appellant’s speech, and neither does the CPUC’s opinion in the present case. Indeed, in the decision below, the CPUC explicitly *rejected* PG&E’s invitation to evaluate the merits of its speech.⁵⁰ Similarly, the CPUC did not express a preference for the content of TURN’s proposed speech.

⁴⁹ In Decision 93887, the CPUC addressed a claim that *Progress* contained “political advertising” in violation of 16 U.S.C. §§ 2623(b)(5), 2625(h). J.S. App. 64-65. However, this claim served only to draw the CPUC’s attention to the broader issues raised by the “extra space” in the billing envelope. The ultimate outcome of Decision 93887 was that the *entire* “extra space”—and not simply that space occupied by “political advertising” (*see* note 1, *supra*)—was found to be “ratepayer property.” *Id.* at 67. As a result, the CPUC’s ultimate decision went far beyond “political advertising” and extended to all uses of the billing envelope other than transmission of bills and legally required notices. For this reason, TURN’s access to the billing envelope does not depend on the presence of “political advertising” in *Progress*, let alone on the viewpoint expressed.

⁵⁰ PG&E attempted to introduce evidence in this case that readers of *Progress* rated the quality of articles quite favorably and found the information useful. Tr. 597. TURN objected to this evidence on the ground that it was irrelevant, precisely because it was *not* asking the CPUC to balance the merits of its own speech versus PG&E’s. *Id.* at 584. The CPUC’s administrative law judge excluded the evidence and the CPUC affirmed this ruling. CPUC App. 9-11.

PG&E's argument to the contrary rests on the CPUC's statements that its intent in opening up the billing envelope was to "use[] the extra space more efficiently for the ratepayers' benefit" and that granting access to TURN would further this goal because the "ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." CPUC App. 22. But PG&E's argument confuses a bias in favor of TURN's speech—which the CPUC at no time exhibited—with a preference for more speakers. The CPUC was not required to, and did not, evaluate the competing merits of PG&E's and TURN's envelope inserts in order to conclude that permitting two speakers to utilize the extra space, rather than one, would better serve the ratepayers' interest. See CPUC App. 22, 27-28. The CPUC finding on which PG&E relies does not disparage PG&E's speech or express a preference for TURN's but simply endorses diversity over exclusivity.⁵¹

PG&E also relies on the Court's strictures against viewpoint-discrimination or content-based prohibitions of speech, which the Constitution almost invariably forbids.⁵² But that constitutional principle does not prevent the CPUC from making reasonable

⁵¹ Amicus Sierra Pacific claims that the CPUC "considered the 'positions which TURN takes regarding PG&E' " and thus evaluated the merits of TURN's speech. SPPC Br. 6 (quoting CPUC App. 18 (emphasis deleted)). This is highly misleading. The cited portion of the CPUC's opinion merely *responded* to PG&E's claim that granting access to TURN would be "improper because TURN . . . does not represent a clearly defined class" of ratepayers. CPUC App. 17. The CPUC's answer was that "there are many positions which TURN takes regarding PG&E that would be shared by substantially all [residential] ratepayers." *Id.* at 18. This hardly constitutes a viewpoint preference by the CPUC and in any event was merely a *response* to a PG&E argument which invited the CPUC to evaluate the character of TURN's prior participation in CPUC proceedings.

⁵² Even *restrictions* on speech that are based on the *subject matter* (as opposed to the viewpoint expressed) are frequently permissible, at least where a public forum is not involved. See, e.g., *United States v. Albertini*, ___ U.S. ___, 53 U.S.L.W. 4844 (June 24, 1985); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 133-25 (1977); *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976); *Greer v. Spock*, 424

and viewpoint-neutral distinctions based on speaker identity in order to ensure that the purposes it sought to achieve in opening up the billing envelope are satisfied. Indeed, even if the CPUC had considered the proposed content of TURN's speech (about which it did not even inquire), there would be no constitutional violation, for the "free speech" portion of the First Amendment does not command the same neutrality of government vis-a-vis speech that the Establishment Clause commands with regard to religion. *Buckley v. Valeo*, *supra*, 424 U.S. at 92. Thus, in many instances government may make explicit content-based choices that go far beyond anything the CPUC has done here.⁵³

The CPUC's decision that the speech of other voices, such as TURN's, should be allowed access from time to time to the extra space thus transgresses no First Amendment standard. This decision *restricted* no one's speech. Nor did it express a preference for the viewpoint of any particular speaker. It attempted to do no more than enhance public debate and promote diversity of expression. The legitimacy of these objectives is beyond question. See *Buckley v. Valeo*, *supra*, 424 U.S. at 92-94 & n.127 (1976); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

U.S. 828, 838 n.10 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

⁵³ For example, Congress may subsidize the lobbying activities of veterans' organizations but not those of others, so long as the purpose is not to suppress disfavored ideas. *Regan v. Taxation With Representation*, ___ U.S. ___, 76 L. Ed. 2d 129, 138-39 (1983). Similarly, access to a school system's internal mail system may be granted only to the recognized employee bargaining representative (and also to church groups, the Cub Scouts, and other local groups), but denied to competing employee organizations. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). See also *Cornelius v. NAACP Legal Defense and Educational Fund*, ___ U.S. ___, 53 U.S.L.W. 5116 (July 2, 1985).

B. The Propriety Of The CPUC's Future Actions In Allocating Access To The Extra Space Is Not An Issue In This Case; In Any Event The CPUC Will Not Be Compelled To Evaluate Competing Applicants By Means Which Violate The Constitution.

1. The Issue Is Prematurely Raised.

PG&E suggests that in the future, the CPUC inevitably will have to select among competing applicants for access to the billing envelope and that this selection process will necessarily (and unconstitutionally) be based on the content of the applicants' speech. PG&E Br. 24-25. In the present case, however, *only* TURN sought access (CPUC App. 21), and the CPUC expressly refrained from considering the issues that may be raised when others follow in TURN's footsteps. *Id.* The CPUC did state, however, that if others applied, it might be "both necessary and desirable" to adopt a "checkoff mechanism"—which TURN itself originated—that would be open to *all* qualified ratepayer organizations interested in participating in CPUC proceedings. *Id.*⁵⁴

At this stage, the CPUC has decided only that access to the PG&E envelope should be limited to groups that seek to solicit funds to be used for residential ratepayer representation in proceedings before the CPUC involving that utility.⁵⁵ Within that

⁵⁴ The "checkoff mechanism" which TURN proposed is described in TURN's Complaint before the CPUC. J.S. App. 75, 77-78, 82-89. TURN envisioned that the "checkoff" would be open to *all* residential ratepayer organizations meeting minimum threshold standards that were wholly free from content- or viewpoint-scrutiny. *See id.* at 83-84; *see also* Post-Hearing Brief of TURN (filed Sept. 28, 1983) at 23-24. Indeed, TURN expressly told the CPUC that "[a]ny regulation of access must be content-neutral and directly related to the purpose of the program itself" (*id.* at 22), and the CPUC agreed. CPUC App. 21-22.

⁵⁵ In *Committee of More Than 1 Million California Taxpayers to Save Prop. 13 v. PG&E*, Decision No. 84-10-062 (J.S. App. 157-64), the CPUC denied an application for billing envelope access by a group that favored a statewide ballot proposition on the ground that the applicant sought access only to further its electoral campaign and not to participate in CPUC proceedings. *See id.* at 160-61. Contrary to

class of potential speakers, only TURN has sought access, and no one has been excluded. The constitutional problems that might arise from the CPUC's future efforts to allocate envelope access to hypothetical claimants are therefore not presented by this case.⁵⁶

This Court will not adjudicate constitutional claims unless "the injury or threat of injury [is] 'both real and immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). This case plainly presents no real and immediate issue regarding the CPUC's future allocations of the extra space. Indeed, there is a strong likelihood that such issues will never arise, since the CPUC has indicated its intent to allocate access in a content-neutral manner and it plainly has the ability to do so.

2. The CPUC Access Program Is Fully Capable Of Being Administered In A Constitutional Manner.

PG&E assumes that the CPUC "will be required to pick and choose from the multitude of competing groups" and that it will "license speakers to use the envelope *based solely upon what they intend to say*." PG&E Br. 25 (emphasis added). But this is precisely what the CPUC has not done and says it will not do. *See* CPUC App. 10-11, 21-22 ("We agree with TURN that an essential element of such a mechanism is the development of neutral criteria to determine eligibility"); *see also* p. 44, *supra*. The CPUC has emphasized its desire to proceed in a content-neutral manner by indicating its willingness once others apply for billing envelope access to adopt a "checkoff" mechanism similar

PG&E's assertion that this decision was based upon the content of the applicant's proposed speech (PG&E Br. 25-26 n.19), the CPUC's denial of the Committee's application in fact demonstrates that the CPUC's access determinations are not based on speech, but upon the role, if any, that the applicant has played or intends to play in CPUC proceedings.

⁵⁶ Moreover, PG&E may not assert the constitutional rights of hypothetical would-be users of the billing envelope, for it plainly has no standing to assert the rights of others. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). Indeed, the utility is *hostile* to the First Amendment claims of access for the other consumer groups whose rights it purports to champion here.

to that proposed by TURN (*see* note 54, *supra*), which would provide access to all qualified applicants without evaluation of the content of their proposed speech. Other content-neutral alternatives are also available to the CPUC; indeed, in its *UCAN* decision (J.S. App. 90-110), the CPUC adopted a quite different, though equally neutral, access mechanism than the one fashioned in this case.⁵⁷ *See generally* Comment, *Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply*, 70 Calif. L. Rev. 1221, 1259-62 (1982).⁵⁸

The CPUC, then, will doubtless be able to allocate access to utility billing envelopes to all qualified consumer groups without considering or evaluating the content of anyone's speech.⁵⁹ But

⁵⁷ In its *UCAN* decision, the CPUC granted a newly-created organization called the Utility Consumers Action Network access to the billing envelope of San Diego Gas and Electric (SDG&E), four times a year for a two-year period. At first, UCAN may use its access only to solicit members and funds sufficient to permit an election to be held for the organization's board; once a board is elected, access may then be used to solicit funds to participate in CPUC proceedings affecting SDG&E. J.S. App. 108-09. Thus the *UCAN* decision, like the decision below, was content-neutral; since UCAN had not yet been formed at the time its right of access to the SDG&E billing envelope was conferred, the CPUC obviously could not have predicated its decision on a subjective evaluation of that organization's speech.

⁵⁸ Nothing in the CPUC's decisions supports the suggestion of some amici that only those who take positions *adverse* to PG&E will be eligible for access. The Commission's opinion refers only to "consumer representative organizations [seeking access] for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E." CPUC App. 2. Groups who believe that the interests of consumers would be served by increasing rates, or promoting nuclear power generation, or by supporting any other position of PG&E are therefore free to seek access under the principles established by the CPUC's decision in this case.

⁵⁹ The CPUC's determination to limit billing envelope access "only to groups organized specifically to represent ratepayers in our proceedings" (J.S. App. 160-61) is plainly constitutional. With regard to the utility billing envelope, the government may grant or deny access "on the basis

even if, *arguendo*, the CPUC eventually undertook to select appropriate consumer representatives who would be given exclusive access to the extra space, the First Amendment would not be violated. So long as the CPUC's selections are not "a facade for viewpoint-based discrimination" (*Cornelius v. NAACP Legal Defense and Educational Fund, supra*), but rather reflect a *bona fide* effort to provide for the expression of diverse points of view by a cross-section of qualified representatives, its choices will be constitutional. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Id.* at 5121.

The purpose of providing access to the billing envelope is, of course, to encourage and facilitate effective participation in CPUC administrative proceedings. CPUC App. 27-29. To that end, the CPUC may make judgments as to the quality of past or probable future participation in such proceedings in precisely the same way that legislative and other public agencies exercise discretion as to whom to hear. *See Minnesota State Board for Community Colleges v. Knight*, ____ U.S. ____, 79 L. Ed. 2d 299, 312 (1984). Courts, too, frequently select appropriate representatives from many competing applications. *See* Fed. R. Civ. P. 23(a)(4); 7 C. WRIGHT & A. MILLER, *FEDERAL PRAC-*

of subject matter and speaker identity," so long as the distinctions "are reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). It undoubtedly is reasonable for the CPUC to require that the billing envelope extra space—whether it belongs to the utility or the ratepayers—be used for the benefit of the utility's customers, and it is equally reasonable to decide that ratepayer benefit is maximized by restricting access to groups that participate in CPUC proceedings involving the affected utility. The use of the billing envelope may, in short, be restricted "to those who participate in the forum's official business" (*id.* at 53), and speakers may be excluded, like the Committee of More Than 1 Million California Taxpayers to Save Prop. 13, if they are "not a member of the class of speakers for whose especial benefit the forum was created . . ." *Cornelius v. NAACP Legal Defense and Educational Fund*, ____ U.S. ____, 53 U.S.L.W. 5116, 5121 (July 2, 1985).

TICE & PROCEDURE §1766 (1972).⁶⁰ Similarly, courts are not required to accept amicus briefs from all who seek to file, and exercise great selectivity in allowing amici—and, indeed, parties—to participate in oral argument. *See* Sup. Ct. R. 38.4.

To date, the CPUC has not even gone this far. It may never do so. On this record, its conduct and approach reflect a meticulous sensitivity for First Amendment principles. Neither it nor TURN seeks to exclude anyone from the extra space on the basis of the viewpoint expressed or the content of his message. To paraphrase what the Court said of Congress' creation of a scheme for public financing of some but not all participants in federal elections:

"[The CPUC's decision] is a[n] . . . effort, not to abridge, restrict, or censor speech, but rather to use [the extra space] to facilitate and enlarge public discussion and participation in the [ratemaking] process, goals vital to a self-governing people. Thus, [the decision] furthers, not abridges, pertinent First Amendment values." (*Buckley v. Valeo*, *supra*, 424 U.S. at 92-93 (footnote omitted))

CONCLUSION

The California Supreme Court's decision denying PG&E's Petition for Review should be affirmed.

Respectfully submitted,

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⁶⁰ Those who are not selected as class representatives are not silenced, but merely lose the advantages that Rule 23 confers upon the class representative. That is also true here, for any organization not given access to the PG&E billing envelope remains free to mail its own letters.